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Supreme Court, U.S.
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In The
Supreme Court of the United States

CASA DE CAMBIO COMDIV S.A. DE C.V.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioner Casa de Cambio S.A. de C.V. ("Casa") respectfully files this reply brief in support of its petition for certiorari. In its Brief in Opposition, Respondent United States has introduced new matter that on close examination further demonstrates that the decision below is contrary to this Court's precedents and raises questions of critical importance to all depositors and indorsers of U.S. Treasury checks and plaintiffs filing complaints in the Court of Federal Claims. Respondent has also mischaracterized the purport of the cases it cites and the record below. Basically, Respondent ignores the very essence and nature of the law of negotiable instruments and the chain of collection that is an integral part of the processing and payment of checks addressed by Part 240 of the Treasury regulations, 31 C.F.R. Part 240. It quixotically urges that a presenting bank that suffers no loss can prosecute a claim on a forged check against the United States, but a depositor who suffers the loss cannot.

As discussed further below, contrary to Respondent's assertions, (a) depositors and indorsers are recognized as essential participants in the commercial banking system and the Treasury regulations are not directed only at protecting the Treasury's rights, (b) a regulation need not confer a right to payment "expressly and with specificity" to be money-mandating, (c) there is a conflict between the circuits as to whether a bank's debit to an account holder which is triggered by the Treasury's debit to the bank is state action within the Due Process protection of the Fifth Amendment, and (d) it is not necessary to plead theories in a complaint, which may not be dismissed unless it is clear that no relief could be granted and in any event the theories in question here were argued in both courts below.

Respondent acknowledges that "the United States is subject to the general rules governing commercial paper," while arguing that the U.S. Court of Appeals for the Federal Circuit did not ignore the obligations of the U.S. Treasury under these rules, but simply found that Casa is not the

proper party to enforce those obligations. Brief for the United States in Opposition ("Resp. Br.") at 7. Indeed, the Federal Circuit recognized that a presenting bank could sue to enforce Treasury's obligations and recognized that such a claim would be governed by the federal common law established in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) ("*Clearfield Trust*"), as modified by the Treasury regulations. Appendix ("App.") at 7-8. Therefore, the Federal Circuit understood – and Respondent does not contest – that the United States has certain obligations as a commercial actor which must be enforceable, but held that Casa is not the proper enforcer.

What Respondent fails to acknowledge is that the effect of the barrier to suits by depositors erected by the Federal Circuit is contrary to the premises upon which *Clearfield Trust* is based. In *Clearfield Trust*, the government was able to recover because of the guaranty of endorsements and this Court considered, but rejected, the

defense of the intervening depositor.[1] In doing so, this Court, contrary to Respondent's contention, Resp. Br. at 9 n.2, recognized the distinction between a forged check, *i.e.*, a forged drawer's signature, and a forged indorsement. In such situations, as this Court recognized in *Clearfield Trust* and in *United States v. Chase Nat'l Bank*, 252 U.S. 485 (1920), the general rule followed in the world of commercial banking is the rule of *Price v. Neal*, 97 Eng. Rep. 871, 3 Burr. 1354 (1762), whereby after final payment, the liability for the loss is imposed on the drawee, in this case the Treasury. The Treasury regulations have not modified this rule, as demonstrated by Treasury's abortive attempts to supplant "Supreme Court precedent interpreting the common law in this area," *i.e.*, the rule of *Price v. Neal*. *See* 62 Fed. Reg.

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1 This Court in explaining the basis for its ruling wrote as follows:

> The fact that the drawee is the United States and the laches those of its employees are not material. *Cooke v. United States*, 91 U.S. 389, 398, 23 L.Ed. 237. The United States as drawee of commercial paper stands in no different light than any other drawee. As stated in *United States v. National Exchange Bank*, 270 U.S. 527, 534, 46 S. Ct. 388, 389, 70 L.Ed. 717, 'The United States does business on business terms.' It is not excepted from the general rules governing the rights and duties of drawees 'by the largeness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt.'

318 U.S. at 269. As this Court recently ruled in *Franconia Assocs. v. United States*, 536 U.S. 129, 122 S. Ct. 1993 (2002), "'[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals,'" *id.* at 2001 (citations omitted), and "limitations principles should generally apply to the Government 'in the same way' that they apply to private parties...," *id.* at 2003 (citations omitted)..

29314, 29315 (1997). Thus, the loss in this case should properly be laid at the doorstep of the Treasury.[2]

Respondent fails to acknowledge that this result, and the enforcement of the Treasury's obligations in the commercial marketplace in general, will go entirely unrealized under the ruling of the Federal Circuit. Under the law of negotiable instruments, a holder in due course is entitled to the protection of the rule of *Price v. Neal* and a drawee bank has no right to debit the presenting bank after final payment. In addition, as amici American Bankers Association, et al. point out, a presenting bank is and remains an agent of the depositor until first examination is complete and final payment is made. U.C.C. § 4-201(a). In

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2 The Federal Circuit's ruling has the effect of achieving the result that the Treasury sought in proposing amendments to its regulations which it has been loathe to institute in light of widespread opposition from the banking community.

Respondent asserts that these proposed amendments to Part 240 are irrelevant and do not recognize any right of a indorser to recover against the Treasury. Resp. Br. at 9 n.3. Contrary to Respondent's assertion, the Treasury has made it clear that its intent in proposing to amend the Part 240 regulations was "to supersede existing Federal common law regarding the apportionment of risk between Treasury and presenting banks with respect to certain materially defective Treasury checks, including counterfeits," 62 Fed. Reg. at 29314, and to, in effect, overturn the decision in *ABN AMRO Bank, N.V. v. United States*, 34 Fed. Cl. 126 (1995), which, the Treasury acknowledged, "held that, under Federal common law, Treasury generally cannot recover on a Treasury check bearing the forged signature of a drawer (i.e., disbursing officer). The Court further held that this result is not changed when a check also bears a forged indorsement on the back. In so ruling, the Court relied on the precedent of *United States v. Chase National Bank*, 252 U.S. 485 (1920), which, in turn, had relied on the English case of *Price v. Neal*, 97 Eng. Rep. 871, 3 Burr. 1354 (1762). The Court went on to hold that Treasury had failed to act in a manner which made evident an intent to modify by regulation the holdings of these cases.... In order to clarify this matter, we are reissuing the proposed rule. Treasury is cognizant of relevant United States Supreme Court precedent interpreting the common law in this area and, by this regulation, will remove any ambiguity regarding Treasury having supplanted that common law." 62 Fed. Reg. at 29315.

this case, Respondent has taken the position that final payment had not been made on the check in question in an obvious attempt to avoid the rule of *Price v. Neal*. *See* Resp. Br. at 11 n.4. If this were true, then Norwest must have remained Casa's agent with respect to the check. Furthermore, pursuant to the accepted rules of commercial banking, a depositor in Casa's position guarantees the indorsements on a negotiable instrument and, in the event of a breach of that guarantee, a presenting bank has a right to recover for the breach. U.C.C. § 4-207(a)(2) & (c). Thus, in circumstances such as occurred here, the depositor would have no recourse against the presenting bank, which was acting as the depositor's agent in any event, and in fact would be required to make the presenting bank whole. As a result, a presenting bank would have no standing to obtain redress from the drawee bank since the injured party is actually the depositor. Accordingly, if Treasury's obligations could only be enforced by the presenting bank, those obligations would never be enforced. At bottom, the issue is whether the United States, one of the largest single issuers of checks, the negotiation of which is of vital importance to the U.S. economy and to operation of the banking business throughout the world, may insulate itself from the fundamental responsibilities upon which the negotiability of checks is based. This Court's precedents make clear that the United States may not avoid such responsibilities.

Respondent's argument with respect to whether the Treasury regulations are money-mandating is similarly flawed. Respondent misstates the test for determining whether regulations are money-mandating, arguing that a regulation must confer a right to payment "expressly and with specificity." Resp. Br. at 9. Contrary to Respondent's assertion, this Court has consistently held that the test is whether a statute or regulation can fairly be interpreted as mandating compensation by the federal government for damage sustained and has made clear that the right to

recover damages may be either express or implied. *United States v. Mitchell*, 463 U.S. 206, 216-217 & n.16 (1983) ("*Mitchell*").[3]

Respondent also argues that the Treasury regulations at 31 C.F.R. Part 240 are intended only to protect the rights of the Treasury and do not even mention depositors, citing the ruling of the Court of Federal Claims below. Resp. Br. at 10. However, in holding that Norwest would have a claim against the United States for the delay in notification which occurred here, the Federal Circuit implicitly recognized that the Treasury regulations do in fact protect the rights of third parties. App. at 7-8. Treasury's repeated efforts to amend its regulations to address the ruling in *ABN Amro Bank N.V. v. United States*, 34 Fed. Cl. 126 (1995), likewise constitute a recognition that the regulations in their current form do not simply protect the rights of the Treasury but also protect the rights of depositors and indorsers who seek to enforce the obligations that the Part 240 regulations clearly impose on the Treasury.

Moreover, those rights must be viewed as extending to depositors such as Casa. A section of a statute or regulation must be read in the context of the larger scheme of which it is a part. *See, e.g., Meyer v. Holley*, 123 S. Ct. 824, 831 (2003) (interpreting phrase in HUD regulation in light of the regulation); *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 155 (2d Cir. 1999); *American Fed'n of Gov't Employees, Local 2782 v. Federal Labor Relations Auth.*, 803 F.2d 737, 740 (D.C. Cir. 1985); *Lizut v. Dep't of Army*, 717 F.2d 1391, 1394 (Fed. Cir. 1983). The Part 240 regulations establish a system for the indorsement and payment of checks drawn on the Treasury that recognizes the participation of a number of actors who are integral to the

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3 Respondent relies heavily on *United States v. Testan*, 424 U.S. 392 (1976), for the proposition that a right to payment must be established expressly and with specificity. However, this Court confined that case to its result and stated that the language which the Respondent cites is dicta which should be disregarded. *Mitchell*, 463 U.S. at 216.

system, including depositors and indorsers. *See, e.g.*, 31 C.F.R. §§ 240.5, 240.6(a) and (d), 240.7, 240.10, 240.11(b), (d) and (f). *See also* 31 C.F.R. § 245.6; *Alnor Check Cashing v. Katz*, 11 F.3d 27, 30 (3d Cir. 1993) (Part 240 regulations "govern the relationship among the federal government, indorsers of government checks, and banks presenting government checks to the . . . Federal Reserve Bank for payment"). Moreover, as discussed above, the rights extended to presenting banks are of little consequence unless those same rights are extended to depositors because presenting banks may have no incentive or standing to enforce any such rights. Thus, the Treasury regulations must be viewed as being money-mandating as to Casa.

Respondent also takes issue with Casa's argument that the decision of the Federal Circuit exacerbates a conflict among the circuits that should be resolved by this Court.[4] Respondent argues that any conflict between the circuit court decisions cited by Casa in its opening brief is irrelevant to the Court's consideration of this case because the cited decisions do not involve the type of claims at issue here. Resp. Br. at 13. While *Breault v. Heckler*, 763 F.2d 62 (2d Cir. 1985), dealt with social security payments that had erroneously been made to a widow, the court identified the issue as whether the debiting of the widow's account by her bank after the Social Security Administration had recouped payment from the bank "is the result of state action *so as to fall within the ambit of the Fifth Amendment.*" *Id.* at 63 (emphasis added). Thus, the issue in *Breault* (as it is here) is whether the action of a bank can be imputed to the federal government for purposes of the protections of the Fifth

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4 *National Board of YMCA v. United States*, 395 U.S. 85 (1969), is irrelevant. It addresses the application of the "direct and substantial" test in the context of damage due to troops attempting to protect real property. Rather, the conflict identified by Casa concerns the radically different context of negotiable instruments and the processing of checks and the impact of the Treasury's action upon the participants in the chain of collection for purposes of the Fifth Amendment.

Amendment.[5] Accordingly, the conflict between these decisions that was identified by Casa is very much on point and should be resolved by this Court.

Finally, Respondent's arguments concerning the standard applied by the Federal Circuit in reviewing the CFC's grant of the Respondent's motion to dismiss is fraught with errors. For example, Respondent argues that a complaint that makes no mention of a claim based on an agency or subrogation theory fails to provide fair notice to the defendant, but the authority cited is at war with this contention. As this Court pointed out in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002), the liberal pleading notice of Rule 8(a) of the Federal Rules of Civil Procedure "is the starting point of a simplified pleading system" and a court may not dismiss a complaint unless it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. Moreover, Rule 8(f) provides that all pleadings shall be so construed as to do substantial justice. *Id.* at 513-14. This Court further noted that if a pleading fails to specify the allegations in a manner that provides sufficient notice, the defendant can move for a more definite statement under Rule 12(e). *Id.* at 514. Casa was not accorded the benefit of these liberal pleading rules and certainly did not "waive" them.

Respondent also argues that the Federal Circuit properly refused to consider Casa's argument that it is entitled to pursue the claims that Norwest had against the Treasury based on a theory of agency or subrogation, citing this Court's ruling that it will not ordinarily decide

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5 Respondent argues that *Breualt* - a procedural due process case - does not involve the types of claims at issue here. Resp. Br. at 13. Yet this case involves a claim for illegal exaction under the Due Process clause of the Fifth Amendment. Moreover, Respondent's attempted distinction means that when money is taken from bank accounts due to a Treasury debit to the bank, one who has obtained money by mistake - as Mrs. Breault had done - is entitled to protection under the Fifth Amendment, while one whose money has been wrongfully taken does not.

questions neither raised nor resolved below. Resp. Br. at 15. However, the Federal Circuit did not base its ruling on the fact that the issue had not been raised or resolved in front of the CFC; in fact, Casa had raised the issue in oral argument in response to specific questioning by that court. *See* Federal Circuit Joint Appendix at 77, 80-81, 83-85. Rather, the Federal Circuit based its determination on the fact that Casa had not pleaded an agency theory in its complaint, a determination that is inconsistent with the liberal pleading rules discussed above. Moreover, as far as this Court's consideration of the issue is concerned, this issue was extensively briefed before and resolved by the Federal Circuit. *See* Brief Of The Plaintiff-Appellant at 11-17, 27-28; Reply Brief Of Plaintiff-Appellant at 2-13, 14, 16, 22-24 Therefore, there is no bar to this Court's consideration of this pleading standards issue.

CONCLUSION

For the foregoing reasons and those set forth in the Petition for Writ of Certiorari, the petition should be granted.

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Respectfully Submitted,

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